

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

74-2447

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CATHERINE BRIGHT,

Defendant-Appellant.

On Appeal From the United States District Court for
the Southern District of New York

REPLY BRIEF OF APPELLANT CATHERINE BRIGHT

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To be argued by

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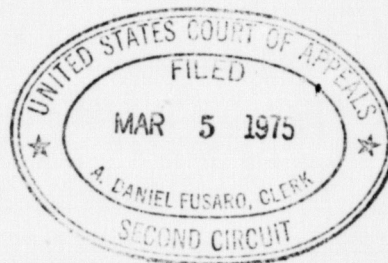


TABLE OF CONTENTS

	<u>Page</u>
I. ARGUMENT	1
POINT I	1
THE DISTRICT COURT ERRED BY EXCLUDING PSYCHIATRIC TESTIMONY WHICH WOULD HAVE DEMONSTRATED THAT APPELLANT LACKED THE MENTAL STATE NECESSARY TO COMMIT THE CRIME WITH WHICH SHE HAD BEEN CHARGED	1
POINT II	7
THE DISTRICT COURT'S CHARGE TO THE JURY ON KNOWLEDGE WAS PRE- JUDICIAL AND CONSTITUTED REVER- SIBLE ERROR	7
II. CONCLUSION	10

TABLE OF CASES

	<u>Page</u>
People v. Colavecchio, 11 App. Div. 2d 161, 202 N.Y.S.2d 119 (4th Dep't 1960)	4
People v. Noah, 12 Cal. App. 3d 1138, 91 Cal. Rptr. 244 (1970)	4
Rhodes v. United States, 282 F.2d 59 (4th Cir. 1960)	4
United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972)	3, 4, 5
United States v. Bush, 466 F.2d 236 (5th Cir. 1972)	4
United States v. Jacobs, 475 F.2d 270 (2d Cir. 1973)	10
United States v. Sarantos, 455 F.2d 877 (2d Cir. 1972)	7-8

CONSTITUTION AND STATUTES

	<u>Page</u>
United States Constitution:	
Fifth Amendment	7
Sixth Amendment	7
18 U.S.C. § 1708	5, 7

OTHER AUTHORITIES

Cooper, G., <u>Diminished Capacity</u> , 4 Loyola L. Rev. 303 (1971)	4
Lewin, T., <u>Mental Disorder and the Federal Indigent</u> , 11 S. Dak. L. Rev. 198 (1966)	4

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :
Plaintiff-Appellee, :
-v- : Docket No. 74-2447
CATHERINE BRIGHT, :
Defendant-Appellant. :
----- x

REPLY BRIEF OF APPELLANT
CATHERINE BRIGHT

I. ARGUMENT

POINT I

THE DISTRICT COURT ERRED BY EXCLUDING PSYCHIATRIC TESTIMONY WHICH WOULD HAVE DEMONSTRATED THAT APPELLANT LACKED THE MENTAL STATE NECESSARY TO COMMIT THE CRIME WITH WHICH SHE HAD BEEN CHARGED.

In its brief on appeal, the Government cavalierly dismisses the first point appellant advanced in her brief

to this court (Ap. Br. 11-35*) by making the bald assertion that such point misconstrues the thrust of the defense which trial defense counsel sought to introduce (Br. 5**). Appellant contends that both she and the Government are asking this court to decide the same question - "can a defendant charged with a crime in which the prosecution is required to prove a specific intent introduce expert psychiatric testimony to show that the defendant was not capable of having the intent in question." Both trial counsel and appellate counsel for Catherine Bright contend that the answer to this question must, for the reasons stated in appellant's brief (Ap. Br. 11-35), be "yes". We submit that the proffered psychiatric testimony should have been admitted into evidence as relevant to the mental ability (or responsibility) of appellant to commit the crime with which she had been charged (Ap. Br. 11-35).

The Government argues that appellant did not introduce any evidence bearing on her "mental responsibility for the acts charged" (Br. 5). This argument is, however, based upon the premise that either the proffered evidence was admissible for the purpose of establishing a defense of

* The reference "Ap. Br." is to appellant's brief. The numbers following such reference refer to the respective pages of such brief.

** The reference "Br." is to the appellee's brief. The numbers following such reference refer to the respective pages of such brief.

"insanity" or not admissible at all. Appellant contends that such a "black or white" approach to the present issue is unjustifiable. She submits that the proffered psychiatric testimony should have been admitted for the purpose of showing her inability to know that the checks in issue had been stolen. If she could not have had the knowledge which is a prerequisite of the crime, it follows that not only was she not mentally responsible for the acts charged, but also that she simply did not and could not commit those criminal acts.

The Government further argues that for several reasons this court should not adopt the rationale of United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972), which is cited by appellant on behalf of her argument before this court (Br. 7-16). Initially, the Government urges that this court should reject Brawner because "the Brawner concept is not the law in this Circuit" (Br. 7). However, appellant believes that her case is one of first impression in this circuit and that therefore such argument by the Government is simply inapposite.

Next, the Government urges that even if this court should determine that the Brawner rationale is sound, its application is limited "to homicide cases or in cases where a lesser included 'general intent' offense provides an alternative short of exoneration" (Br. 12). Such a view can be sustained neither by logic nor precedent. As noted

by the court in People v. Noah, 12 Cal. App. 3d 1138, 1147, 91 Cal. Rptr. 244, 249 (1970), vacated on other grounds, 5 Cal. App. 3d 469, 96 Cal. Rptr. 441, 487 P.2d 1009 (1971):

Since People v. Wells, it has been the law of this state that evidence of diminished mental capacity, whether caused by intoxication, trauma or disease, can be used to show that a defendant did not have a specific mental state essential to an offense. Although first introduced and usually involved in homicide cases, the rule is of general application: mental illness not amounting to legal insanity may negative the existence of a particular mental state that is an element of the crime charged. (emphasis added). (footnotes omitted).

That the application of the Browner rationale is not limited as argued by the Government is further evidenced by the cases of Rhodes v. United States, 282 F.2d 59 (4th Cir. 1960), cert. denied, 364 U.S. 912 (1960) (Ap. Br. 30), and People v. Colavecchio, 11 App. Div. 2d 161, 202 N.Y.S. 2d 119 (4th Dep't 1960) (Ap. Br. 32-33). See, United States v. Bush, 466 F.2d 236 (5th Cir. 1972). See also, T. Lewin, Mental Disorder and the Federal Indigent, 11 S. Dak. L. Rev. 198, 246 (1966); G. Cooper, Diminished Capacity, 4 Loyola L. Rev. 308, 329 (1971). Appellant submits that her right to introduce evidence to negative knowledge, an express statutory element of the crime with which she had been charged, is protected by constitutional and common law principles. Accordingly, the admission of the proffered testimony cannot be made to depend, as the Government would argue, upon the

fortuitous circumstance of whether a defendant may be prosecuted for a lesser included offense which provides an alternative short of exoneration.

The Government then argues that even if the Browner rule were applicable in a prosecution under Title 18, United States Code, Section 1708, this is not an appropriate case for such application because trial defense counsel did not make a showing of some purportedly necessary "sufficient scientific support" (Br. 13-14). However, in the case at bar, an offer of proof was made (Tr. 22-27*). Had the trial court thought that additional evidence was appropriate and had it therefore elected to make further inquiry, trial defense counsel could have demonstrated through Doctor Weiss that appellant's passive dependent personality condition is a scientifically recognized mental disorder which prevented appellant from having the knowledge requisite for commission of the crime with which she had been charged. But no such inquiry was made and the defense was rejected, not for lack of a proper foundation, but for an alleged lack of legal authority to support the position of trial defense counsel (Ap. Br. Exhibit D, 9).

The Government next suggests that legislative, rather than judicial action would be the appropriate

* The reference "Tr." is to the transcript of trial in the district court. The numbers following such reference refer to the respective pages of such transcript.

vehicle to sanction the admission of evidence such as the psychiatric testimony proffered in this case (Br. 16). The argument that this court should abandon to the legislative branch of the Government its duty to protect the constitutional and common law rights of the appellant is both without precedent and without merit.

Finally, the Government argues that the exclusion of the proffered psychiatric testimony does not constitute reversible error because it "would not have added anything of relevance in any event" (Br. 17). Simply stated, such an argument flies in the face of logic. The very issue, and the only issue, in the trial below was whether appellant knew that the checks in her possession had been stolen. To be sure, appellant testified that she did not know the checks were stolen. However, the testimony of an independent medical expert would have explained to the jury the reason that appellant could not have known that the checks were stolen. Such testimony would certainly have bolstered appellant's own testimony and, we submit, might well have been sufficient to tip the scales of justice in her favor.

We should note in conclusion that, notwithstanding the fact that the Government did not discuss the constitutional arguments raised in appellant's brief, appellant asserts that the district court deprived her of her rights under the

Fifth and Sixth Amendments to the Constitution of the United States by excluding the proffered psychiatric testimony in question (Ap. Br. 11-17).

POINT II

THE DISTRICT COURT'S CHARGE TO THE
JURY ON KNOWLEDGE WAS PREJUDICIAL
AND CONSTITUTED REVERSIBLE ERROR.

The district court charged the jury that they could find that appellant possessed the knowledge requisite to sustain a conviction if she acted only with a reckless disregard as to whether the checks in question were stolen (Tr. 277). This instruction effectively obviated the necessity for a finding of the specific intent necessary to convict under Title 18, United States Code, Section 1708 and allowed the jury to return a guilty verdict based on a lesser standard than that contemplated by the statute. Reckless disregard connotes something other than wilful, deliberate or conscious purposefulness. This court itself discerned the merit of appellant's present argument in United States v. Sarantos, 455 F.2d 877, 881-82 (2d Cir. 1972), wherein it noted:

Sarantos points out that in Abrams we stated that 'the jury could have found . . . that appellant acted with reckless disregard of whether the statements made were true and with a conscious purpose to avoid learning

the truth' (emphasis added), whereas in Egenberg we upheld a charge which substituted the word 'or' for 'and.' Since the court below followed the disjunctive phrasing of Egenberg, appellant argues that we should revert to the Abrams formulation and reverse his conviction. We see no reason to take such drastic action. . . . [A]ny differences in meaning that might possibly result from the substitution of 'or' for 'and' would surely constitute harmless error. While we prefer the use of the connective 'and' because we think the repetition better impresses on the jurors' minds the importance of finding a deliberate disregard of the facts, we do not think our preference requires a new trial. We do, however, urge the use of 'and' rather than 'or' in future charges on this issue. (emphasis added).

Even, assuming arguendo, the substitution of the word "or" for "and" in the challenged instruction might, in some cases, constitute harmless error, it is clear that such substitution caused substantial prejudicial and reversible error in the case at bar. The knowledge of the appellant was the sole contested issue at trial. The jury, deliberating on whether it could find that she possessed the knowledge requisite to sustain a conviction, became confused on the single vital element that they were required to find before a verdict of guilty could be returned. This confusion was manifested by the jurors' note to the district court:

Request clarification of term 'reckless disregard' as it pertains to whether the defendant had knowledge of whether checks were stolen.

Also - can that be stipulated as part of the verdict?

In response to this inquiry, the district court gave the erroneous instruction which is now being challenged. It is evident from the jurors' note that "reckless disregard" had become the focal point of their concern and deliberation. Thus, at the crucial moment when the jury had become confused in regard to their understanding of the only vital element in the case, the district court, far from impressing on the jurors' minds the importance of finding a deliberate, purposeful, conscious or knowing disregard of the facts, gave a charge which allowed, encouraged and indeed probably resulted in the jury returning a guilty verdict based on an insufficient legal standard. Nor can it be argued that the jury instructions of the district court prior to the challenged one supplied the necessary charge with respect to reckless disregard. Obviously, as indicated by its note, the jury was unclear as to the meaning of reckless disregard and its relationship to knowledge. Thus, as further indicated by its note, the jury did not understand the district court's previous instructions with respect to such matters. Appellant submits that the district court resolved the jurors' confusion by instructing them with a legally deficient charge. Thus, a consideration of the practical realities which occurred at trial, as well as of applicable legal principles, dictates that the verdict below cannot be sustained because of the district court's erroneous charge.

Finally, it is submitted that the Government's argument with respect to the requested instruction on "actual belief" (Br. 19-20) puts the cart before the horse. We agree that the Government must prove that appellant knew that the checks in question had been stolen. If the jury had found that she possessed an actual belief that those checks had not been stolen, such finding would have precluded it from returning a guilty verdict. See, United States v. Jacobs, 475 F.2d 270, 287, n.37 (2d Cir. 1973), cert. denied sub. nom. Thaler v. United States, 414 U.S. 821 (1973). The district court's failure to give trial defense counsel's requested instruction on actual belief was contrary to the authority of the relevant cases in this circuit (Ap. Br. 38) and substantially prejudiced the rights of appellant. It is submitted that such action cannot meet with the approval of this court upon review.

II. CONCLUSION

For each of the foregoing reasons and for the reasons set forth in appellant's initial brief, the judgment in the trial court below should be reversed.

Dated: New York, New York
March 5, 1975

Respectfully submitted

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